(10) (7) (6)

No. 93-517, 93-527, 93-539

In The

Supreme Court of the United States

October Term, 1993

BOARD OF EDUCATION OF THE KIRYAS JOEL VILLAGE SCHOOL DISTRICT, et al.,

Petitioners,

v.

LOUIS GRUMET AND ALBERT HAWK,

Respondents.

On Writ Of Certiorari To The New York Court Of Appeals

BRIEF OF THE SOUTHERN BAPTIST CONVENTION CHRISTIAN LIFE COMMISSION AS AMICUS CURIAE SUPPORTING PETITIONERS

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January 21, 1994

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28 AP

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES:

TABLE OF AUTHORITIES – Continued

No. 93-517, 93-527, 93-539

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This brief is being filed with the written consent of counsel for both the petitioners and the respondents, which consents have been filed with the Clerk of the Court.

INTEREST OF THE AMICUS CURIAE

The Southern Baptist Convention is the nation's largest Protestant denomination, with over 15.4 million members in over 38,400 local churches. The Christian Life

Commission is the public policy agency of the Convention and is assigned to address religious liberty and other public policy issues. Amicus produces publications and seminars to educate Southern Baptists about ethical and moral issues in daily Christian life, and to advocate responsible Christian citizenship as part of biblical decision-making. Amicus also seeks to bring biblical principles and Southern Baptist convictions to bear upon public policy debates before courts, legislatures and policy-making bodies. Amicus frequently files briefs as *amicus curiae* in important religious liberty litigation, such as this case.

Southern Baptists are deeply interested in and affected by both free exercise and establishment issues, and desire to see the Court develop a workable test which will safeguard the interests behind both clauses.

STATEMENT OF THE CASE

Amicus adopts the statement of facts in the petitioner's brief. The following facts are summarized as most important to our arguments.

In 1989, the New York State legislature passed Chapter 748, entitled "AN ACT to establish a separate school district in and for the village of Kiryas Joel, Orange county".[1] On July 24, 1989, Governor Mario Cuomo

[1] Chapter 748 of the Laws of 1989 provides:
§ 1. The territory of the village of Kiryas Joel in the town of Monroe, Orange county, on the date when this act shall take effect, shall be and hereby is constituted a separate school district, and shall be known as the Kiryas Joel village school district

signed the law, stating his conclusion that it is facially constitutional, while also urging the school district to "take pains to avoid conduct that violates the separation of church and state because then a constitutional problem would arise in the application of the law. The village officials acknowledge this responsibility." 1 R. 111.

The law is not challenged as applied, or for any conduct by the school which violates church-state separation. Rather, it is challenged as facially unconstitutional as an establishment of religion. Still, it is relevant to note some facts about the nature and function of the school that was created.

Since July 1, 1990, the Kiryas Joel Village School District has operated a totally secular special education school for approximately 200 disabled children who are part-time or full-time students. The disabilities of the students include "mental retardation, deafness, speech and language impairments, emotional disorders, learning disabilities, Down's Syndrome, spina bifida and cerebral palsy." *Board of Education v. Wieder*, 72 N.Y. 2d 174, 179, 531 N.Y.S.2d 889, 891 (1988). The public school building is secular in design and furnishing. The curriculum is secular, covering reading, writing, arithmetic, music and

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and shall have and enjoy all the powers and duties of a union free school district under the provisions of the education law.
§ 2. Such district shall be under the control of a board of education, which shall be composed of from five to nine members elected by the qualified voters of the village of Kiryas Joel, said members to serve for terms not exceeding five years.
§ 3. This act shall take effect on the first day of July next succeeding the date on which it shall have become a law.

physical education, all without religious content. The faculty is secular, including a superintendent who served for 20 years in the New York City public school system, and who is not Hasidic. The teachers and therapists are ethnically and religiously diverse, none living in the village. Nothing about the manner of operation of the school has violated Governor Cuomo's warning about church-state separation.

Respondents, who are officers of the New York State School Boards Association, filed suit, claiming that Chapter 748 is unconstitutional on its face because it allegedly "establishes religion" in violation of the First Amendment of the United States Constitution, and the New York State Constitution. The New York trial judge held that the statute violated all three prongs of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), as well as the New York Constitution. The Appellate Division, Third Department, affirmed, 2-1, holding that the second prong of *Lemon* was violated because the primary effect of the law was to advance religion. The court said that "religion played a role in the dispute," over many years of controversy and litigation. Therefore, the solution of creating a school district coterminous with the village had created "a symbolic union between church and state" that "is significantly likely to be perceived by adherents of the Satmarer Hasidim as an endorsement, and by nonadherents as a disapproval of their individual religious beliefs." The New York Court of Appeals affirmed the holding as to the second prong of the Lemon test.

The residents of the village are members of a religious order known as Satmar Hasidic Jews, devoutly religious people who believe in maintaining an insular

community where religious ritual is scrupulously followed. Yiddish is frequently spoken, and distinctive religious attire is the norm. Television is excluded. Generally, children receive their education in private schools, separated as to gender, rather than in public schools.

The village is a municipal corporation. The citizens of the village have voluntarily chosen to live in the geographic proximity to each other so as to facilitate the exercise of their shared religious beliefs and preserve their unique culture and way of life. (Pet. App., p.3)

The village was formerly part of the surrounding Monroe-Woodbury school district. At one stage Hasidim parents tried sending their disabled children to the Monroe-Woodbury special education school, but their children suffered emotional trauma from being teased and ridiculed for their differences of dress and customs by the other students. Parents then withdrew their handicapped children until the new school district was created, permitting a special education school within the Village community, where Hasidim would be the norm.

Other plans had been tried. Under one plan, public school teachers came onto private school premises to teach the disabled children. *Aguilar v. Felton*, 473 U.S. 402 (1985), prohibited a similar arrangement, so this plan was stopped. Another plan set aside several public school classrooms for Satmar children only, but this plan was also judicially invalidated under the *Lemon* test. Finally the state legislature, the governor, the schools, and the parents discovered the idea of Chapter 748, creating a new school district within the village, which satisfied everyone – except for the school boards association

leaders. They complained that the plan appeared to be public funding of a private religious school. Further, since only Hasidic Jews lived in the Village, the new school district would be controlled by an exclusively Hasidic school board.

No one is excluded from residing in the village because of religion or race, and no resident children are excluded from attending the public school based on religion or race. The testimony of superintendent Benardo is that the KJV district has provided bilingual and bicultural services to non-Hasidic students whose primary language is Yiddish and whose school district of residence could not offer such services. It has also begun an assessment of providing services to a few Spanish-speaking children who reside in Kiryas Joel. Benardo Aff. 8-9. Nonetheless, respondents contend that the purpose of the statute was to accommodate the separationist religious doctrine of the Hasidim, and that such accommodation has the unlawful effect of endorsing religion by creating a symbolic union between the state and the religious community.

SUMMARY OF ARGUMENT

Chapter 748 does not violate the Establishment Clause, because it accommodates the independently-derived religious practices of the community and its student population. It does not interfere with the religious liberty of non-adherents by forcing them to participate in religious practice or to subsidize religious teaching. It does not favor one form of religious belief over another. It

does not use the government's taxing or spending power to induce, coerce or distort individual religious choice, or to interfere with the religious autonomy of a religious institution.

ARGUMENT

I. THE PRINCIPLE OF ACCOMMODATION SHARPENS THE FOCUS UPON RELIGIOUS LIBERTY AS THE GOAL OF THE RELIGION CLAUSES, MAINTAINING BENEVOLENT NEUTRALITY BETWEEN GOVERNMENT AND RELIGION.

There is widespread agreement that the Establishment Clause and the Free Exercise Clause have as their common ultimate goal the protection of religious liberty.[2] Professor Michael McConnell, University of Chicago Law School, in his article, *Coercion: The Lost Element of Establishment*, 27 WM. & MARY L. REV. 933 (1986) makes clear that the primary good of the religion clauses is freedom of religious choice, and the primary evil is government interference with religious choice in a manner which induces, coerces or distorts the free choices of religiously-based conscience. Religious liberty includes both individual choice of religious belief and practice, and autonomy of religious organizations from government interference.

In *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 144-145 (1987), this Court said: "the government may

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[2] M. McConnell, *Accommodation of Religion*, SUP. COURT REV. 1985, p.1-59.

(and sometimes must) accommodate religious practices . . . without violating the Establishment Clause."

The principle of accommodation is rooted in the logic of the text of the First Amendment. Obviously, the prohibition on establishment must be interpreted in some manner that is logically consistent with government's obligation not to prohibit the free exercise of religion. The concept of accommodation with benevolent neutrality serves this end.

The first modern case to define the concept was *Zorach v. Clauson*, 343 U.S. 306, 313-14, (1952), involving a public school program of "released time" in which students were permitted to leave school premises during the day to attend religious instruction off campus. The Court said:

> "When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs."

In *McDaniel v. Paty*, 435 U.S. 618 (1978), the Court struck down a state law which sought to bar clergymen from elective public office. Justice Brennan explained: "government [may] take religion into account . . . to exempt, when possible, from generally applicable government regulation individuals whose religious beliefs and practices would otherwise thereby be infringed, or to create without state involvement an atmosphere in which voluntary religious exercise may flourish." 435 U.S. at 639.

Permissible accommodations allow government to take religion into account to remove obstacles to a religious practice or belief that was adopted independently of any government action, and that pre-existed government involvement. Impermissible accommodations create an incentive, inducement or coercion to adopt religious practices or beliefs favored by the government. The principle of accommodation has been frequently discussed by most justices in many of the religion cases over the past three decades.[3]

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[3] See *Corporation of Presiding Bishops v. Amos*, 483 U.S. 327 (1987) (upholding Title VII's exemption for religious organizations from employment discrimination law.) *Gillette v. United States*, 401 U.S. 437 (1971) (upholding religious conscientious objection from military service.) *Walz v. Tax Commission*, 397 U.S. 664 (1970) (upholding exemption of religious organizations from real estate taxes.) *Trans World Airlines v. Hardison*, 432 U.S. 63 (1977) (upholding statutory requirement that employer provide reasonable accommodation for employees' religious practice under Title VII of the Civil Rights Act.) *Wisconsin v. Yoder*, 406 U.S. 205 (1972). (exemption of Amish parents and their secondary-aged students from mandatory school attendance laws, was required by free exercise, and did not violate establishment clause.) *Widmar v. Vincent*, 454 U.S. 263 (1981) (state university must allow college student group equal access to open forum, and this does not violate establishment clause.) *Mergens v. Westside Community Schools*, 110 S.Ct. 2356 (1990) (federal Equal Access Act, extending *Widmar* equal access principle to secondary school Bible clubs, etc., does not violate establishment clause.) *Marsh v. Chambers*, 463 U.S. 783, 812 (1983) (Brennan, J., dissenting) (distinguishing between official legislative prayers and prayers that would "accommodat[e] individual religious interests.") *Thomas v. Review Board*, 450 U.S. 707, 727 (1981) (Rehnquist, J., dissenting) ("governmental assistance which does not have the effect of 'inducing' religious belief, but instead merely 'accommodates' or implements an

In *Walz v. Tax Commission,* 397 U.S. 664 (1970), Chief Justice Warren Burger, the author of *Lemon,* held that real estate tax exemptions for religious organizations did not violate the Establishment Clause. He described the relation of free exercise and establishment clause concerns this way:

> "The course of constitutional neutrality in this area cannot be an absolutely straight line; rigidity could well defeat the basic purpose of these provisions, which is to insure that no religion be sponsored or favored, none commanded and none inhibited. The general principle deducible from the First Amendment and all that has been said by the Court is this: we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a *benevolent neutrality* which will permit religious exercise to exist without sponsorship or interference." [emphasis added] (at 397 U.S. at 669)

It is this principle which your amicus urges this Court to restore to its proper and fundamental place in Religion Clause jurisprudence.

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independent religious choice does not permissibly involve the government in religious choices, and therefore does not violate the Establishment Clause.") *Sherbert v. Verner,* 374 U.S. 399 (1963) (free exercise requires religious exemption in unemployment compensation law, and this does not violate establishment clause.) *Lee v. Weisman,* 112 S.Ct. 2649 (1992) (Souter, J., concurring that commencement prayer violated the establishment clause as state-sponsored religious worship: "accommodation must lift a discernible burden on the free exercise of religion.")

II. THE *LEMON* TEST BLURS THE FOCUS ON RELIGIOUS LIBERTY, FIXATING INSTEAD ON SECULARISM, PRODUCING HOSTILE RESULTS FOR RELIGIOUS ACCOMMODATION.

A. The *Lemon* Test fixates on secularism, not religious liberty.

The very formulation of the *Lemon* test seems to obscure the value of religious liberty. According to *Lemon*, first, every legislative purpose must be secular. Second, the primary effect must be secular, neither advancing nor inhibiting religion. Third, government must avoid excessive entanglement with religion.

By asking, as the threshold question, whether a religious accommodation has a secular purpose and secular effects, the *Lemon* test has virtually predetermined the outcome against religion. Thus, the test promotes, secularism, not religious liberty. If secular is understood to mean non-religious, then religious accommodations by government will be presumed to be illegal. There is nothing in this test that would encourage public officials to presume that accommodations of religion may foster religious liberty, and therefore may be lawful.

B. The *Lemon* Test fosters hostility, not neutrality.

Insisting on a secularizing purpose, and permitting only secular effects makes the test inherently hostile to religious liberty. The *Lemon* test does not adequately address permissible accommodations, or provide clear guidance to officials and courts who must draw lines between permissible accommodations of religion and

impermissible benefits to religion. When *Lemon* is applied, courts often strike down benevolently neutral actions by public bodies trying to show tolerance of all elements of America's pluralistic society.

The courts below, applying *Lemon*, hold that the public institution whose goal is to teach good citizenship and tolerance cannot itself tolerate religious diversity among patrons and students, for fear that this might have the "primary effect" of advancing or endorsing a religion that is contrary to the secular dogma of conformity.

Many parents and teachers have retreated from public schools, in part because they refuse to accept the "absolutely secular" model. They perceive, as Justice Goldberg warned, a "brooding and pervasive devotion to the secular, and a passive, and even active, hostility to the religious."[4]

C. The *Lemon* Test fuels religious prejudice, not respect for religious pluralism.

The instant case is a good example of how *Lemon* takes the focus off of religious liberty and puts it on secular objectives, producing hostile results. *Lemon* looks at a secular law creating a secular school, and suspects that the lawmakers' purpose was not sufficiently secular, since religious persons benefited. Such myopia sees Governor Cuomo and the New York legislature intending to

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[4] *Abington School District v. Schempp*, 374 U.S. 203, 306 (1963).

establish Hasidic Judaism as a government-favored religion. *Lemon* either overlooks or declares illegitimate the intention to provide the special educational services to disabled children, while accommodating the pre-existing Hasidic convictions as much as reasonably possible.

Lemon next focuses on secular effects, regardless of the intentions of lawmakers. Here, *Lemon* demands that the "primary effect" of the law "neither advances or inhibits religion." The lower courts said the special education services were already being provided at a public school outside the Village, so Chapter 748 did not have the primary effect of providing special education services, but rather the effect of catering to the separatist religious doctrine of the Hasidim, allowing them to dictate that a school must be located within their village.

The Hasidim did not dictate anything. Lawmakers made a deliberate and thoughtful compromise decision about the best possible way to accommodate the state's interest in education and the Hasidim's interest in protection of their disabled children. *Lemon* strains to see who got the better end of the bargain, the state or religious parents, and if religious people were satisfied with the plan, it must be illegal.

Respondents' greatest fear seems to be that Chapter 748 will advance the petitioners' "insular" or "separatist" religious tenets.[5] They say "accommodation [of Satmar

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[5] Most Southern Baptists do not share the particular religious beliefs or practices of the petitioners at issue in this case. Many Baptists and other Christians embrace the biblical principle that a follower of Jesus Christ should be "separated" from

separatist beliefs] would contravene the basic purpose of our system of public education to prepare students for citizenship in a heterogeneous democratic society because the state would be directly involved in promoting separatism rather than pluralism." R. Br. p. 22. Respondents express their conviction about the importance of secular, heterogeneous pluralism with almost religious fervor, as if it were the official religion of public education. Since petitioners don't want their children to be conformed into the homogeneous mold of the surrounding community, respondents seem to treat petitioners like heretics, or worse – "segregationists." Respondents strain credulity to connect this religious community to racial "segregationists" practicing "gerrymandering." Their hostility toward the religion of petitioners is transparent, and appalling, but is fostered by the *Lemon* test's "search and destroy" mindset against religious accommodations in public life.

Wisconsin v. Yoder, 403 U.S. 205 (1973) has many parallels with this case. The religious beliefs of Amish parents regarding separatism in education and culture were accommodated by exempting the parents' children from

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the world, and should resist the world's pressures to conform to the surrounding culture. Christians are exhorted to be "in the world" without being "of the world." In Second Corinthians 6:14-17, the Apostle Paul repeats the Old Testament command, " 'Therefore, come out from them and be separate,' says the Lord." See also John 17:14-17 and Romans 12:2. Baptists would interpret and practice the principle of separation much differently than the Hasidim, but readily defend the religious liberty of the Hasidim to practice their religion without government interference.

the mandatory public school attendance laws. Here the state of New York has voluntarily made such an accommodation. In neither case is there improper "endorsement."

Also relevant is the case from last term, *Zobrest v. Catalina Foothills School District*, 113 S.Ct. 2462, 125 L.Ed.2d 1 (1993), in which a state-paid interpreter could be furnished to a deaf student at a private religious school, without establishing religion, because the aid was a specific application of an overall policy "that neutrally provide[s] benefits to a broad class of citizens defined without reference to religion." (at page 2466). Similarly, Chapter 748 is a specific application or adaptation of the school districting laws to provide benefits to disabled children, a class defined without reference to religion.

D. The *Lemon* Test feeds confusion, not clear direction

Consistency has not been a hallmark of the *Lemon* test. It has been used to prohibit the display of a poster listing the Ten Commandments in Kentucky classrooms, *Stone v. Graham*, 449 U.S. 39 (1980). Yet, in *Lynch v. Donnelly*, 465 U.S. 668 (1984), Chief Justice Rehnquist observed that "The very chamber in which oral arguments on this case were heard is decorated with a notable and permanent – not seasonal – symbol of religion: Moses with the Ten Commandments." 465 U.S. at 677. In *Lynch*, the Court side-stepped *Lemon* and upheld a nativity scene display by the city of Pawtucket, Rhode Island. But in *County of Allegheny v. A.C.L.U.*, 109 S.Ct. 3086 (1989), the Court upheld a government display including a menorah,

while prohibiting a government display of a creche, citing *Lemon* as the basis for both holdings.

A majority of the members of this Court have criticized the *Lemon* test for both theoretical and practical problems. See *Lamb's Chapel v. Center Moriches School District*, 113 S.Ct. 2141 (1993) (Scalia, J., concurring in the judgment) (collecting cases at 2149-50)). The inconsistent holdings confuse public officials about what the law is and how to apply it. Mixed signals cause collisions at the intersection of Church and State. Clearer signals might reduce collisions and tensions at this important intersection.

III. A REVISED TEST SHOULD ENCOURAGE GOVERNMENT OFFICIALS TO SHOW ACCOMMODATING NEUTRALITY TOWARD PRIVATE RELIGIOUS CHOICES, INDEPENDENTLY DERIVED, WHICH ARE NEITHER INDUCED, COERCED OR SUBSIDIZED BY THE STATE.

Your amicus joins the petitioners and other amici who urge the Court to use this case as the vehicle to reformulate an Establishment Clause test which will guide public officials in upholding government accommodations of religion, while "determin[ing] when accommodation slides over into promotion, and neutrality into favoritism." *Texas Monthly v. Bullock*, 489 U.S. 1, 40 (1989) (Scalia, J., dissenting). As Justice O'Connor stated in her concurring opinion in the moment of silence case, *Wallace v. Jaffree*, 472 U.S. 38, 105 S.Ct. at 2504, (1983), "the challenge posed by [the accommodation argument] is how to

define the proper Establishment Clause limits on voluntary government efforts to facilitate the free exercise of religion."

A new Establishment Clause test should have as its goal the promotion of religious liberty, including the protection of both individual choice and institutional autonomy from government coercion and interference. A test based on these principles, would include the following:[5]

I. Does the state action allow or accommodate independent religious choice? Religious choice is independent if:

A. The religious practice or belief pre-existed the state action, or

B. The religious practice is adopted through private, family, church or community influences, and

C. The state action does not provide preferential treatment for a particular religious practice or belief, which has the demonstrable effect of inducing, coercing or distorting religious choice.

II. Does the state action interfere with the religious liberty of non-adherents by inducing or coercing them to alter their religious practice?

III. Does the state action go beyond accommodation and show favoritism toward one religious choice which would not be shown to other religious or non-religious choices?

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[5] See article by M. McConnell, *Accommodation*, pages 35-39.

IV. Does the state action use the taxing and spending power of government to provide some financial incentive, benefit or penalty to a particular religious activity which is not given to other religious or non-religious alternatives?

A. Is the demonstrable effect to induce, coerce or distort:

1.) religious choice by individuals or

2.) the religious autonomy of a religious institution?

B. Is the demonstrable effect to directly subsidize religious worship, teaching, and indoctrination?

A. The Creation of a Village District is a neutral accommodation of independent religious choice.

The creation of the KJV district is a neutral accommodation of the independent choices of the Satmar Hasidim. Their beliefs and cultural practices derive from ancient tradition, and surely pre-exist the state action in dispute in this case.

The state is not involved in the religious aspects of the Hasidim community other than to acknowledge their concerns about the educational environment for their special needs children, which reasons happen, in this instance, to be religiously based. If the reasons were purely psychological or cultural, the state would have acted the same. Chapter 748 accommodates religious needs in the same way the state would have responded to similar psychological needs of children of other religions or no religion.

B. Chapter 748 does not induce, coerce or distort religious choices of adherence or non-adherence.

The Court of Appeals held that Chapter 748 is unlawful because, on its face, the law violates the second prong of *Lemon*, i.e., it has the primary effect of advancing religion. The court analyzes whether the effect of the law is to "endorse" religion, using a term favored by Justice O'Connor. The court also refers to the symbolic impact or the message of endorsement implied by "a close identification of the responsibilities of government and religion (See *Grand Rapids School District v. Ball*, 473 U.S. 373, 389" . . . (1985)). (601 N.Y.S.2d 61 at 66).

The issue has already been decided by this Court in *Wolman v. Walter*, 433 U.S. 229 (1977). The Court considered various types of "state aid to pupils in church-related elementary and secondary schools" (at page 232) and found that "providing therapeutic and remedial services at a neutral site off the premises of the non-public school will not have the impermissible effect of advancing religion" (at 248). "The premises" means that religious premises caused the apparent endorsement of religion. If the premises are state-owned and controlled, there is no violation simply because the pupils or their parents retain religious convictions.

The proposed accommodation test takes a different approach to the same concerns raised in the various tests for "endorsement" or "coercion" or "symbolic union." Under this approach, the state action is examined with an eye to inducements, coercion or pressure to change or distort one's religious practices to suit the state. By this

test, the state action is benevolently neutral. No one should feel like a "second class citizen" who is not Satmar, and no one should feel that the Satmar religion is favored because of the secular nature of the special education school which is created. Everyone should feel grateful that the state will work hard to accommodate even minority religions, in the field of special education especially.

C. Mistaken beliefs about endorsement should be corrected by disclaimers, rather than capitulating to them by repeal of the law.

If someone mistakenly believes that the State is endorsing the religion of Hasidic Judaism by this law, the correct solution to that problem is an explanation, not the voiding of the law. In numerous prior cases where there was concern about apparent endorsement of religion by government, the court has held that the solution was not to penalize the religious person, but to have a government official make an announcement disclaiming endorsement to those who may misunderstand. For example, airport official soften post signs or play recorded announcements in a terminal area, disclaiming state endorsement of religious or political leafleteers. In *Widmar v. Vincent*, 454 U.S. 263 (1981), the Court cited the use of a disclaimer in the university student handbook to dispel the appearance of state endorsement of the student groups which used the student union.[6] *Widmar*, supra.

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[6] *Widmar v. Vincent*, 454 U.S. 236, 276, n.15 (1981).

D. Lemon's obsession to purge religious intentions and effects invites excessive entanglement.

The respondents object to the state accommodating the educational concerns of parents if those concerns are religiously based, even if the parents and the state may articulate the trauma being experienced by Hasidic children in purely secular, psychological, or educational terms. *Lemon's* neutrality-turned-hostility threatens to push courts and officials into excessive entanglement, the very concern of the third prong of *Lemon*. If the state, through its political branches, finds legitimate educational reasons to pass a particular education law, courts should not scrutinize the words and motives of religious parents in this manner to see if law is "secular" enough to be legal.

In *Widmar v. Vincent*, 454 U.S. 263 (1981), Justice White based his dissent in part on a distinction between religious speech, which he said was protected in school buildings, and religious worship, which he said was not protected. (White, J., dissenting at pages 283-86) The majority disagreed, noting that this distinction would entangle officials and courts in the scrutiny of words, motives and religious significance by religious groups, to discern what words were mere speech, and what words were religious worship. *Widmar, supra,* at 269-70, note 6; 272 note 11.

CONCLUSION

The Establishment Clause may reasonably be interpreted to require the "separation" of the institutions "of Church and State," but it does not require the separation of religious persons or principles from the State. The metaphorical "wall of separation between church and state" was never intended to become a wall of separation between handicapped children and the public help they so desperately need.

Religious persons have a fundamental right to participate in government, to bring their religiously-informed principles to bear upon policy-making, and to share in public services to which they contribute tax dollars. If the Establishment Clause prohibited government from expressing benevolent regard for religion, then the Free Exercise Clause would have been the first violation of the Establishment Clause. The Free Exercise Clause is clearly official action affirming the inherent value and good of religious liberty, so that its free exercise is to be among the First Freedoms to be protected in our Bill of Rights.

Relentless secularism also violates the Establishment Clause. The State is to be religiously pluralistic – not secular, in order to accommodate religious liberty, that private religious choices may flourish. This Court can advance this value by refocusing upon freedom of religious choice as the touchstone of the Religion Clauses, by upholding accommodations of religion which demonstrate benevolent neutrality, so long as taxing and spending powers are not used to coerce, induce or distort individual choice or interfere with autonomy of religious organizations.

This Court is now presented with a compelling opportunity, root out the malevolent secularism which has infected the *Lemon* progeny, and to replace it with benevolent neutrality, and thereby to restore an Establishment Clause doctrine which will promote religious liberty rather than obliterate it.

The judgment of the New York Court of Appeals should be reversed.

Respectfully submitted,

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